IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEALS NO.48/1999 & 76/2000

FIRST APPEAL NO.48 OF 1999

Mr. Tilak Raj Bhalla,
major, married, businessman,
residing at Panaji, Goa. ..... Appellant.

V/s.

Mr. Ulhas Narayan Sanvordekar
(since deceased) represented by his LRs.

1) (a) Smt. Jaya Ulhas Sanvordekar,
(b) Mast. Vaibhav Ulahs Sanvordekar,
(c) Mast Utpal Ulhas Sanvordekar,
(d) Miss Praiyanka Ulhas Sanvordekar,
All residing at Tukaram Apartment,
Flat No.1, Opp. Kamat Apartments,
Tonca, Caranzalem, Goa. ..... Respondents.

Mr. V.R. Tamba, Advocate for the appellant.

Mr. M.S. Usgaonkar, Sr. Advocate with Mr. Sudin M.S. Usgaonkar, Advocate for the respondents.

FIRST APPEAL NO.76 OF 2000

Mr. Ulhas Narayan Sanvordekar
(since deceased) represented by his LRs.

(a) Smt. Jayashree Ulhas Sanvordekar,
widow of Ulhas Savordekar,

(b Utpal Ulhas Sanvordekar,
son of late Ulhas Savordekar,
aged 21 yeaers.

(c) Vaibhav U. Savordekar,
son of late Ulhas Savordekar,
aged 16 years,

(d) Miss Praiyanka Ulhas Sanvordekar,
aged 13 years,
All residing at Tukaram Apartment,
Flat No.1, Opp. Kamat Apartments,
Tonca, Caranzalem, Goa. ..... Appellants.

V/s.

Mr. Tilak Raj Bhalla,
major, married, businessman,
residing at
Behind Magsons Super Centre,
La Campala Housing Colony,
Miramar, Panaji, Goa. ..... Respondent.

Mr. M.S. Usgaonkar, Sr. Advocate with Mr. Sudin M.,S Usgaonkar, Advocate for the appellants.

Mr. V.R. Tamba, Advocate for the respondent.

CORAM : A.P. LAVANDE, J.

Date of reserving the Judgment :
10th February, 2005.

Date of pronouncing the Judgment :
21st April, 2005.

J U D G M E N T :

The above two appeals are preferred by the plaintiff and the defendant against Judgment and Decree dated 19th January, 1999, passed in Special Civil Suit No.25/1993/A by the Civil Judge, Sr.

Division, Panaji. The appellant in First Appeal No.48/99 is the plaintiff in the Special Civil Suit No.25/93/A and the respondent is the defendant in the said suit. Since both the appeals are preferred against the same Judgment and Decree, they are being disposed of by this common Judgment. The parties will be, hereinafter, referred to as "the plaintiff" and "the defendant". The plaintiff filed the above mentioned suit against the defendant for declaration, recovery of possession, damages, permanent injunction and consequential reliefs.

2. Briefly, the case of the plaintiff is as follows :

The plaintiff was carrying on business under the name and style "Novelty House and Wine Stores" situated at Old Bus Stand, Panaji, Goa and had licence for the same. On 1.4.1983, he entered into an agreement with the defendant for the purpose of management of the business of bar and restaurant on the terms and conditions mentioned in the said agreement. In terms of the said agreement, the defendant had to pay Rs.2500/- per month on or before 5th of every succeeding month and in the event, the defendant failed to pay the said sum for three consecutive months, the agreement was to come to an end and the defendant was to hand over peaceful possession of the suit premises to him along with articles which were handed over to him by the plaintiff. According to the plaintiff, the defendant had failed to pay the monthly compensation for a

consecutive period of 28 months from October, 1990 to January, 1993 and on that ground the plaintiff claimed the defendant to be a trespasser and claimed mesne profits.

3. Briefly, the case of the original defendant is as follows :

The agreement dated 1.4.1983 was though styled as management agreement, the plaintiff in fact had permanently inducted him in the suit premises. According to the plaintiff, the said agreement was still in force and, as such, the suit was not maintainable. Although the agreement dated 1.4.1983 was styled as agreement for management, it was executed on bona fide plea that the defendant was carrying out activities in the suit premises permanently on payment of agreed compensation and the agreement was reduced in writing in such a way so as not to get trapped by the provisions of the Rent Control Act. On 13.10.1990, there was a fire in the premises causing loss on account of destruction of fixtures and furniture and other articles in the suit premises and it was agreed between the plaintiff and the defendant that whatever amount the plaintiff gets from the insurance company, would be adjusted in the monthly compensation payable to the plaintiff and since the plaintiff had claimed an amount of Rs.83,000/- from the insurance company, no amount was due to the plaintiff towards the monthly compensation. The defendant also contended that the excise licence was cancelled from

1.4.1989 and the plaintiff without informing him about the cancellation of licence, managed a raid at the instance of Excise Inspector to make a ground for eviction. The defendant claimed damages in the sum of Rs.2,00,000/- and also claimed compensation by raising a counter claim against the plaintiff. The plaintiff filed written statement to counter claim opposing the claim made in the written statement.

4. Upon pleadings of the parties, the trial Court framed the following issues :

1. Whether the plaintiff proves that he is entitled for vacant possession of the suit premises ?

2. Whether the plaintiff proves that he is entitled for mesne profits in the sum of Rs.2,500/- per month with effect from January 1991 to January 1993 at 24 % interest till vacant possession is given to him ?

3. Whether the plaintiff proves that on account of withholding possession of suit premises he suffered loss in the sum of Rs.2 lakhs?

4. Whether the defendant proves that plaintiff has no cause of action to file the present suit ?

4A. Whether the plaintiff proves that he is entitled from the defendant an amount of Rs.3,557/- as arrears of water charges paid by the plaintiff to P.W.D. With interest at the rate of 24 % . a. from 1.2.96 till full payment ?

5. The trial Court by the impugned Judgment and Decree, declared that the defendant has no right, title or interest to the suit premises and

the Agreement dated 1.4.1983 had come to an end due to violation of the conditions of the agreement. The defendant has been also directed to pay to the plaintiff a sum of Rs.7500/- being the monthly compensation at the rate of Rs.4500/- for consecutive three months i.e. October, 1990 to December, 1990 and mesne profits at the rate of Rs.2500/- per month from January, 1991 to January, 1993 with interest at the rate of 15 % per annum from 1.2.1996 till payments. In so far as amount of Rs.45,000/- withdrawn by the plaintiff during the pendency of the suit, the same had been ordered to be adjusted from the amount due to the plaintiff and the Bank Guarantee furnished by the plaintiff at the time of withdrawal of the said amount has been ordered to be discharged, after the appeal period is over. The original defendant expired on 6.8.2003 during the pendency of these appeals and his legal representatives have been brought on record. The defendant has filed Appeal No.76/2000, challenging the Decree passed by the trial Court and the plaintiff has filed appeal No.48/1999, claiming future mesne profits at the rate of 2500/- per month and interest at 15 % per annum thereon.

6. On the basis of the pleadings and the Judgment of the trial Court, the following points arise for determination in the present appeals.

1) Whether the plaintiff is entitled to vacant possession of the suit premises ?
2) Whether the plaintiff is entitled to mesne profits as ordered by the trial Court?
3) Whether the plaintiff is entitled to future mesne profits and interest thereon from the date of filing of the suit? and
4) Whether the defendants are entitled to reliefs claimed in

the counter claim?

7. The learned Counsel for both the parties argued at length and relied upon a number of authorities. The learned Counsel also submitted written synopsis.

8. Mr. Usgaonkar, learned Senior Counsel appearing on behalf of the legal representatives of the original defendant submitted that since the plaintiff had not sought specifically the relief of possession, the trial Court ought not to have framed issue No.1 and as such, the plaintiff is not entitled to the possession of the suit premises. Mr Usgaonkar further submitted that in the course of execution proceedings, the defendant was ordered to hand over possession of the suit premises in terms of the Order passed by the executing Court and the revision filed against the said order having been dismissed by this Court by Order dated 13.10.2001, the possession of the suit premises was handed over to the plaintiff in September 2002. The learned Counsel further submitted that since no specific relief by way of recovery of possession was sought, the defendant is entitled to get back the possession by filing an appropriate application in the event, the appeal filed by the defendant is allowed.

The learned Counsel further submitted that having regard to the terms and conditions of Agreement dated 1.4.1983 entered into

between the plaintiff and the original defendant, it is evident that the transaction between the parties was essentially a lease and not the management of business. The learned Counsel relied upon several clauses of the said agreement and submitted that the only conclusion which can be drawn from the Agreement and also on the basis of the evidence produced on record is that the relationship between the plaintiff and the defendant was that of lessor and lessee. The learned Counsel further submitted that since there was a lease agreement in respect of the suit premises, the plaintiff is not entitled to claim recovery of possession of the suit premises, since the defendant is protected under the provisions of the Goa, Daman and Diu, (Lease, Rent and Eviction) Control Act, 1968 (hereinafter, referred to as `the Rent Act').

The learned Counsel further submitted that the finding of the trial Court that there was a licence in respect of the suit premises is, both contrary to law and evidence on record, since it is not the case of the plaintiff himself that there was a licence granted in respect of the suit premises, but the case of the plaintiff was that it was an agreement of management between the parties. The learned Counsel further submitted that the finding of the trial Court that the agreement between the parties is not an agreement of lease, is contrary to the law and having regard to the clauses of the said agreement and having regard to the principles laid down in various Judgments on which Mr. Usgaonkar placed reliance, the

only conclusion that can be drawn is that by the said agreement was an agreement creating lease and not an agreement of management. In support of his submission that the agreement is one of lease and not of management, the learned Counsel submitted that various tests have been laid down by the Apex Court and different High Courts and having regard to those tests, the only conclusion that can be drawn is that the agreement is of lease. In support of this submission, the learned Counsel has relied upon the following Judgments :

(1)***Associated Hotels of India Ltd. vs. R.N. Kapoor,*** (AIR 1959 SC 1262);

(2) Sohan Lal Naraindas vs. Laxmidas Raghunath Gadit, (1971) (1) SCC 276);

(3) Capt. B.V. D'Souza vs. Antonio Fausto Fernandes, (1989 (3) SCC 574)

According to the learned Counsel, since the original defendant was a tenant in respect of the suit premises, the trial Court had no jurisdiction to deal with the matter and the jurisdiction was exclusively with the Rent Controller under the Rent Act.

Mr. Usgaonkar further submitted that the agreement was in force even on the date of filing of the suit, since the same was not terminated and clause 4 of the said agreement permitted renewal and

since, admittedly, the plaintiff had accepted the compensation in respect of the suit premises for the month of September, 1990 and even thereafter, having not terminated the agreement, the agreement was in force and, as such, the suit filed by the plaintiff was not maintainable for want of cause of action. The learned Counsel, relying upon the reply dated 10.4.1989 (Exhibit PW.1/E) of the defendant to the plaintiff, further submitted that the case of the defendant that the agreement was renewable for further equal periods of five years on the same terms and conditions, as stated in the said reply, has not been disputed by the plaintiff at any point of time and, therefore, the only conclusion is that the agreement was in force even on the date of filing of the suit.

The learned Counsel further submitted that the agreement was in respect of bar and restaurant and since the excise licence in respect of the suit premises was cancelled and that too at the instance of the plaintiff, the plaintiff is not entitled to pay any amount because the amount payable in respect of the bar and restaurant could not be severed.

In so far as payment for the month of September, 1990 is concerned, according to the learned Counsel, the original defendant paid the compensation for September, 1990 with a hope of renewal of the excise licence by the plaintiff. According to the learned Counsel since the licence was cancelled at the instance of the plaintiff himself, on

equitable principle, the plaintiff is not entitled to claim any amount from October, 1990 in respect of the suit premises. In support of the submission that on equitable principle the plaintiff cannot be assisted by Court of law to take advantage of the mischief committed by him, the learned Counsel relied upon Judgment of the Apex Court in ***Ashok Kapil vs. Sana Ullah,*** ((1996) 6 SCC 342) .

The learned Counsel then sought to argue that since the agreement entered into between the parties was contrary to law as also contrary to the provisions of the Goa Excise Duty Act and the Rules framed thereunder, and in terms of Section 23 of the Contract Act, the plaintiff is not entitled to any monetary relief against the defendant. In support of this submission, the learned Counsel relied upon the following Judgments:

(1)***Hadibandhu Behra vs. Gopal Sahu and ors. (***AIR 1943 Patna 374);

(2) Fakirchand vs. Bansilal, : (AIR 1955 Hyderabad, 28);

(3) Krishna Menon vs. Narayan Ayyar and ors. : (AIR 1962 Kerala 21);

(4) ***S.L. Fernandes vs. V.M. Fernandes. :*** (AIR 1981 Goa, Daman and Diu 18).

9. Per contra, Mr. Tamba, learned Counsel appearing for the plaintiff submitted that the Agreement dated 1.4.1983 can, by no stretch

of imagination, be termed as `lease', on the following grounds :

(a) The defendant has not laid any foundation for the plea sought to be raised and argued for the first time before the appellate Court and no issue of tenancy was framed by the trial Court.

(b) The correspondence between the plaintiff and the defendant prior to the suit, does not establish that the defendant had claimed that the agreement was an agreement of lease;

(c) The defendant in the written statement as well as in the evidence has admitted that the agreement was of management

(d) The receipts produced by the defendant himself which were issued by the plaintiff clearly make a mention of compensation and not rent.

The learned Counsel further submitted that in so far as recovery of possession of the suit premises is concerned, an issue had been framed by the trial Court and the defendant was put to notice about the claim of recovery of possession, although the same was not specifically pleaded and prayed for. According to the learned Counsel, once it is held that the agreement of management had come to an end on account of violation of the conditions and a finding is given that the defendant had no right, title or interest in the suit premises, it naturally follows that the defendant is bound to hand over possession of the suit premises to the plaintiff. In any event, the learned Counsel submitted that in the execution proceedings, the possession has been already handed over to

the plaintiff and, the order passed by the executing Court directing delivery of possession of the suit premises having been upheld by this Court in Civil Revision Application No. 201/2001 by Order dated 13.10.2001, the defendant is not entitled to contend that the plaintiff is not entitled to recovery of possession of the suit premises.

According to the learned Counsel, the agreement between the parties was an agreement of management and, therefore, once there was violation of the conditions of the agreement, the agreement came to an end and the defendant was bound to vacate and hand over peaceful possession of the suit premises to the plaintiff. The learned Counsel relied upon clause 9 of the said agreement, which reads as under :

> "9. In the event the second party fails to pay consecutively for three months the monthly amount of Rs.2500/- then this Agreement will come to an end and the Second Party shall vacate and handover peaceful possession of the premises to the Fist Party".

The learned Counsel further submitted that clause 4 of the said agreement has to be read harmoniously with clause 9 and even if the agreement was not terminated in the year 1988, on account of non-payment of compensation for three consecutive months, the agreement

came to an end since the defendant had not paid the compensation for the months of October, 1990 to December, 1990, as held by the trial Court. The learned Counsel further submitted that the trial Court has rightly held that the defendant was in arrears from October, 1990 and his claim that he did not pay the amount since the insurance amount which was obtained by the plaintiff on account of the fire in the suit premises was agreed to be adjusted against the compensation payable by the defendant, has been rightly rejected by the trial Court. The learned Counsel submitted that the evidence on record clearly establishes that even after 1.4.89, the defendant was carrying on the liquor business in the suit premises, which is established by the evidence brought on record about the raids conducted in the suit premises by the Excise Department. According to the learned Counsel, the respondent ought not to be allowed to urge that the agreement was in breach of the Excise Act and the Rules and opposed to the public policy and consequently, hit by Section 23 of the Contract Act since such a plea was not taken in the trial Court and the defendant had no opportunity to deal with the same. In any event, there was no transfer of licence, in order to come to the conclusion that the agreement was in violation of the Goa Excise Act and Rules framed thereunder and, as such, contrary to public policy, being hit by Section 23 of the Contract Act.

The learned Counsel further submitted that the trial Court ought to have allowed the plaintiff to carry out the amendment since the same was granted on 23.12.1988, but on account of the reasons beyond the control of the plaintiff, the same could not be carried out in the plaint before the Judgment was delivered. In any event, the learned Counsel submitted that the plaintiff is entitled to future mesne profits even in the absence of any claim in the plaint and in support of his submission he relied upon the Judgment of the Apex Court in ***Gopalkrishna Pilla v. Meenakshi Ayal (AIR 1967 SC 155)***. The learned Counsel further submitted that the plaintiff is entitled to interest on future mesne profits.

10. I have considered the submissions made by the learned Counsel for the parties. I have also gone through the records and the Judgments relied upon by the learned Counsel.

11. In so far as the submission of Mr. Usgaonkar, learned Senior Counsel that the plaintiff is not entitled to recovery of possession of the suit premises in the absence of any prayer is concerned, I am unable to agree for several reasons. Once the trial Court held that the defendant had no right or title in the suit premises, the necessary consequence which follows is that the defendant has to hand over possession of the suit premises to the plaintiff and, therefore, the plaintiff is entitled to recovery of possession which is a consequential relief. Although the

plaintiff had not specifically sought for recovery of possession of the suit premises, the fact remains is that issue No.1 about entitlement of the plaintiff to the vacant possession of the suit premises was framed and the parties went to trial with full knowledge of the case set up by each of them. I am, therefore, of the view that the plaintiff is entitled to recovery of possession of the suit premises. In any event, the executing Court having held that the plaintiff is entitled to recovery of possession of the suit premises which order has been upheld by this Court in Civil Revision Application No. 201/2001, I am of the view that the issue about entitlement of the plaintiff to the possession of the suit premises has become final. Therefore, I am unable to accept the submission of Mr. Usgaonkar that the plaintiff is not entitled to recovery of possession of the suit premises.

In so far as the next submission of the learned Senior Counsel that the agreement between the parties was not of management, but of lease, I am unable to accept the same. Although as contended by Mr. Usgaonkar at some places in the said agreement the word `rent' has been used and the exclusive possession was with the defendant, these facts by themselves could not be construed to mean that the relationship between the plaintiff and the defendant was of lessor and lessee. I find considerable substance in the submission of Mr. Tamba that the defendant having not taken a specific plea in the written statement that

the defendant was tenant in respect of the suit premises and further that no issue of tenancy was framed, the defendant cannot be permitted to now urge, in appeal, that the defendant was tenant in respect of the suit premises. Having regard to the pleadings in the written statement, in my view, no issue about tenancy was rightly framed by the trial Court, since no specific plea of tenancy was taken by the defendant in his written statement. Therefore, in my view, the plea taken by the defendant that the defendant was tenant in respect of the suit premises cannot be permitted to be urged at this stage. Moreover, I am also in agreement with the submission made by learned Counsel appearing for the plaintiff that the correspondence prior to the suit as well as the evidence of the defendant himself clearly establish that the agreement was not an agreement of lease. Having regard to the several clauses in the agreement, the pleadings and the evidence led by the parties, it is established that the agreement between the parties was of management. I am, therefore, unable to accept the submission of Mr. Usgaonkar that the defendant being tenant of the suit premises, the Civil Court lacked jurisdiction to deal with the suit. I am also unable to accept the submission of Mr. Usgaonkar that no eviction can be ordered of the defendant as he being the tenant, is protected under the Rent Control Act. However, Mr. Usgaonkar is right in contending that the finding of

the trial Court that the agreement was of leave and licence is contrary to law and dehors the pleadings.

In so far as submission of Mr Usgaonkar that the agreement even if it is taken as agreement of management, was not terminated even on the date of filing of the suit, I find myself unable to agree with the same. It will be relevant to make a reference to Clause 9 of the said agreement, which has been already quoted above. The said clause clearly mentions that in the event the defendant fails to pay consecutively for three months the amount of Rs.2500/- , then the agreement will come to an end and the defendant shall vacate and hand over peaceful possession to the plaintiff. The defendant having agreed that non-payment of compensation for three consecutive months, will result in termination of the agreement, cannot now contend that the agreement was in force even on the date of filing of the suit. The finding given by the trial Court that the defendant had not proved that there was an agreement between the plaintiff and the defendant to adjust the insurance amount obtained by the plaintiff from the insurance company on account of the fire in the suit premises, against the compensation payable by the defendant, cannot be faulted. That being the position, the necessary consequence is that the defendant was in arrears in payment of compensation from October, 1990. The trial Court was, therefore, absolutely justified in awarding Rs.7500/- being the compensation for

the months of October, 1990 to December, 1990.

The finding of the trial Court that the plaintiff is also entitled to mesne profits at the rate of Rs. 2500/- per month from January 1991 till the filing of the suit also cannot be faulted. I am also unable to agree with the submission of Mr Usgaonkar that the excise licence in respect of the suit premises was cancelled at the instance of the plaintiff, and, therefore, the plaintiff is not entitled to claim any compensation from April, 1989. It is pertinent to note that the defendant himself paid the compensation from April, 1989 to September, 1990 in respect of the suit premises to the plaintiff, but the explanation offered on behalf of the defendant is that the same was paid with a hope that the plaintiff would renew the liquor licence. I am unable to accept the submission that the said payment was made with such a hope. In any event, the defendant having occupied the suit premises and having not handed over possession of the suit premises, was bound to pay the compensation in respect of the suit premises to the plaintiff. I am also unable to accept the submission of the learned Counsel on behalf of the defendant that since the agreement was contrary to the provisions of the Excise Act and Rules, was hit by Section 23 of the Contract Act and, therefore, the plaintiff was not entitled to any compensation from the defendant. In my view, there was no transfer of the licence to attract the provisions of the Excise Act and the Rules framed thereunder and, therefore, the

submission made on behalf of the defendant that the plaintiff is not entitled to compensation cannot be accepted.

I am also unable to accept the submission on behalf of the defendant that since the liquor licence was cancelled from 1.4.1989 in respect of the suit premises, the defendant was not liable to pay Rs.2500/- since the amount payable in respect of the bar and restaurant could not be severed. At this stage, it is pertinent to note that the evidence on record clearly establishes that inspite of the fact that the excise licence in respect of the suit premises was cancelled, the defendant was selling liquor in the suit premises. Therefore, the submission on behalf of the defendant that the plaintiff is not entitled to any compensation on that ground cannot be accepted.

I am also unable to accept the submission of Mr. Usgaonkar that it was the plaintiff himself who was responsible for cancellation of the excise licence in respect of the suit premises. The evidence on record clearly establishes that the Excise Department took a view that a person could not have both, retail as well as wholesale licence for sale of liquor and on that count, the licence in respect of the suit premises was cancelled. Having regard to the evidence on record, I am unable to accept that it was the plaintiff who was responsible for cancellation of the licence. In any event, even after the licence in respect of the suit

premises was cancelled, the defendant continued to use the suit premises for the purpose of selling liquor and in that view of the matter, the compensation awarded in favour of the plaintiff cannot be faulted.

12. In so far as the submission of Mr. Tamba, learned Counsel appearing for the plaintiff that the plaintiff is entitled to future mesne profits even in the absence of specific prayer, I find considerable force in the said submission. Once it is held that the defendant has no right, title or interest in the suit premises, the necessary consequence is that he is not entitled to retain the possession of the suit premises thereafter. Moreover, it is pertinent to note that the trial Court had allowed the application for amendment filed by the plaintiff, claiming future mesne profits, but the amendment was actually not carried out before passing of the Judgment and the trial Court did not permit the plaintiff to carry out the amendment after passing of the Judgment and Decree. This being the position, the fact remains is that the prayer for mesne profits was actually allowed, but a formal amendment to the plaint was not carried out by the plaintiff. In view of these facts and in view of the ratio laid down by Apex Court in ***Gopalkrishna Pilla vs. Meenakshi Ayal (Supra)*** in my view, the plaintiff is entitled to future mesne profits from the date of the suit till the delivery of possession. In my opinion, the quantum of mesne profits will have to be decided by the trial Court in an inquiry under Order 20, Rule 12 of the Code of Civil Procedure and the

trial Court will have to pass an appropriate order, after holding an inquiry. I am, therefore, not inclined to grant future mesne profits as claimed by the plaintiff in his appeal.

13. As regards the counter claim preferred by the defendant, I hold that the defendant is not entitled to the counter claim made by him having regard to the evidence on record. The finding of the trial Court on this issue cannot be faulted.

14. In the result, therefore, I pass the following order :

The Judgment and Decree dated 19.1.1999, passed by the Civil Judge, Sr. Division, Panaji in Special Civil Suit No.25/93/A is upheld. The plaintiff is also entitled to future mesne profits from the date of filing of the suit till the date of recovery of possession. The trial Court shall hold inquiry under Order 20 Rule 12 CPC to ascertain future mesne profits.

In view of the above, First Appeal No.48/1999 is partly allowed and First Appeal No. 76/2000 is dismissed. Having regard to the fact that the original defendant died during the pendency of the appeal and the appeal was prosecuted by his LRs., and having regard to the facts and circumstances of the case, I am not inclined to grant costs in favour of the plaintiff. Hence, the parties are directed to bear their own

costs. Decree be drawn accordingly.

A.P. LAVANDE, J.

ssm.